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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 CURTIS HARVEY MERCHANT) Civil No. 09-856 WQH (NLS)
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12 Plaintiff,)
13 v.) **ORDER RE PLAINTIFF'S DISCOVERY**
14 H. LOPEZ, P. WEITZEIL) **MOTIONS**
15) [Docket Nos. 42, 44 & 46.]
16 Defendants.)
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16 Plaintiff has filed three motions: for writs of habeas corpus ad testificandum for production of
17 incarcerated witnesses; for an issuance of subpoenas for potential witnesses; and to depose Defendants'
18 expert witness. [Doc. Nos. 42, 44 & 46.] Defendants have filed their Responses to the motions. [Doc.
19 Nos. 49, 50 & 51.]

20 **I. WRITS OF HABEAS CORPUS AD TESTIFICANDUM**

21 Plaintiff asks this Court to issue writs of habeas corpus ad testificandum with regard to six
22 inmates. [Doc. No. 46.] 28 U.S.C. 2241(c)(5) provides that writs of habeas corpus "shall not extend to a
23 prisoner unless [] [i]t is necessary to bring him into court to testify or for trial." A writ of habeas corpus
24 ad testificandum, used to transport a prisoner to a court proceeding, will not issue if there is no
25 proceeding before the court in which the prisoner wishes to testify. *Russell v. United States*, 308 F.2d
26 78, 79 (9th Cir. 1962). There is no hearing presently before the Court and no trial date has been set.
27 Therefore, the Court **DENIES** as moot Plaintiff's motion for issuance of writs of habeas corpus ad
28 testificandum.

1 **II. SUBPOENAS FOR WITNESSES TO APPEAR AT TRIAL**

2 Plaintiff requests that the Court issue subpoenas for the attendance of several individuals, parties
3 and non-parties, at trial. [Doc. No. 44.] Plaintiff's request is premature. A date or time for trial has not
4 been set.

5 The Court **DENIES** as moot this motion.

6 **III. DEPOSITION OF EXPERT WITNESS**

7 Plaintiff requests an order from the Court allowing him to depose Defendants' expert witness,
8 Robert Borg, by way of interrogatories under Federal Rule of Civil Procedure 26(b)(4)(B). This Rule
9 states that a party may discover, through interrogatories or deposition, opinions held by an expert who is
10 *retained only for trial preparation* by another party but *not expected to be called as a witness to trial*.

11 Rule 26(b)(4)(B) does not apply to Mr. Borg because Defendants plan to present him as an
12 expert witness at trial. [Kosla Decl. ¶ 2-3.] Nevertheless, to give Plaintiff the benefit of the doubt, he
13 may have intended to make reference to subsection (b)(4)(A), which allows him to depose an expert
14 "whose opinions may be presented at trial" after the expert's report has been provided. In this case Mr.
15 Borg's report has been served on Plaintiff and Plaintiff may depose him. [*Id.*]

16 However, the Court cannot order the issuance of interrogatories to effect a deposition of Mr.
17 Borg by Plaintiff. Interrogatories may only be served on *a party* to the lawsuit. *See* FED. R. CIV. P.
18 33(a)(1) ("a party may *serve on any other party* no more than 25 written interrogatories") (emphasis
19 added).

20 Plaintiff may depose Mr. Borg under Rule 26(b)(4)(A) without leave of court but unless
21 "manifest injustice" would result, Plaintiff must pay Mr. Borg a reasonable fee for time spent in
22 responding to such discovery. *See* FED R. CIV. P. 26(b)(4)(C)(I). Additionally, as noted in a previous
23 order of this Court, if Plaintiff pursues depositions by written questions under Rule 31, he will need to
24 expend his own resources in procuring a deposition officer to transcribe Mr. Borg's testimony, for
25 notice and delivery of the questions, and for filing of the deposition. [Doc. No. 39.]

26 This motion is also **DENIED** as moot.

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1 **IV. CONCLUSION**

2 Based on the above discussion, all of the aforementioned motions are **DENIED** as moot.

3 **IT IS SO ORDERED.**

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5 DATED: September 8, 2010

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7 Hon. Nita L. Stormes
8 U.S. Magistrate Judge
9 United States District Court
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